

**DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS**

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

ARAM H. KAILIAN and
KATHRYN I. KAILIAN
Respondents

Case Nos.: I-00-70186
I-00-20419

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985, as amended (D.C. Official Code §§ 2-1801.01 *et seq.*), and Title 22, Chapter 1 of the District of Columbia Municipal Regulations (“DCMR”). By Notice of Infraction (No. 00-70186) served October 10, 2001, the Government charged Respondents Aram H. Kailian and Kathryn I. Kailian with a violation of 22 DCMR 107.1 for allegedly failing to comply with an order to abate for rats.¹ The Notice of Infraction

¹ 22 DCMR 107.1 provides:

The Director of Public Health and the Director of Consumer and Regulatory Affairs are authorized to make, or cause to be made, inspections of existing buildings and other structures to determine the prevalence of rats, and if necessary for protection of the public health, they may order the following things to be done:

- (a) The vent stoppage of any rat-infested building or other structure or part thereof;
- (b) The removal from the premises of trash or refuse which may provide rat harborages;
- (c) The protection of food and garbage from rats; and
- (d) The extermination of rats on the premises by baiting or trapping, or both.

charged that Respondents violated § 107.1 on September 7, 2001 at 1630 19th Street, N.W., and sought a fine of \$1,000.

Respondents failed to answer the Notice of Infraction within the allotted time (15 days plus 5 days for mailing pursuant to D.C. Official Code §§ 2-1802(e) and 2-1802.05). Accordingly, on November 19, 2001, this administrative court issued an Order finding Respondents in default and subject to a statutory penalty of \$1,000 pursuant to D.C. Official Code §§ 2-1802.01.04(a)(2)(A) and 2-1802.02(f), and requiring the Government to serve a second Notice of Infraction pursuant to D.C. Official Code § 2-1802.02(f). The Government served the second Notice of Infraction (No. 00-20419) on November 30, 2001.

On December 12, 2001, Respondents filed answers of Deny to the Notices of Infraction pursuant to D.C. Official Code § 2-1802.02(a)(3), and an evidentiary hearing was held on January 30, 2002. Ronnie Herrington, the charging inspector in the case, appeared on behalf of the Government. Kathryn Kailian appeared on behalf of Respondents. Based on the testimony of the witnesses and my assessment of their credibility, the admitted documentary evidence and the entire record in this matter, I now make the following findings of fact and conclusions of law:

II. Findings of Fact

1. At all times relevant to this matter, the property located at 1630 19th Street, N.W., (Square 0111) (the “Property”) was subdivided into three lots (Nos. 821, 822 and 823), said subdivisions having been separately identified by the District of Columbia Government for real property taxing and business permit purposes. Respondents’ Exhibits (“RX”) 202, 203 and 206.

2. At all times relevant to this matter, Respondents owned or controlled the property located at Square 0111, Lot 821 (hereinafter identified as “Property Subdivision A”); nonparty William Luke Stewart owned or controlled the property located at Square 0111, Lot 822 (hereinafter identified as “Property Subdivision B”); and nonparty Robert A Harris IV owned or controlled the property located at Square 0111, Lot 823 (hereinafter identified as “Property Subdivision C”). RX 202-204.

3. According to a District of Columbia Home Occupation Business Permit issued May 3, 2000 (No. HP00-0261), at all times relevant to this matter, Respondents operated a skin rejuvenation and acne clinic at Property Subdivision A. Petitioner’s Exhibit (“PX”) 102; RX 206. Respondents have no business interest, ownership or control over Property Subdivision B or Property Subdivision C. RX 202-204.

4. On September 7, 2001, Mr. Herrington inspected the rear of the Property abutting the alley and observed rodent activity, including rat holes near the trash receptacles abutting the alley. PX 107 and 108. The rodent activity was on either Property Subdivision B or Property Subdivision C, but was not on Property Subdivision A. RX 203. At that time, Mr. Herrington issued a 14-day Notice to Abate Rodent Harborage to Respondents, and mailed it to “1630 19th Street, N.W.” PX 100. Respondents never received the Notice to Abate.

5. On October 10, 2001, the Government served the first Notice of Infraction (No. 00-70186) upon Respondents by regular mail using the 1630 19th Street, N.W. address. The Government served the second Notice of Infraction (No. 00-20419) on November 30, 2002 using the 1630 19th Street, N.W. address.

6. Respondents received the first Notice of Infraction on or around October 21, 2001. Upon receiving the Notice of Infraction, Respondent Kathryn Kailian telephoned Mr. Herrington to discuss the Notice of Infraction, and Mr. Herrington came to the Property on October 23, 2002 to discuss the Notice. While at the Property, Mr. Herrington took additional photographs. PX 102-104. At that time, Mr. Herrington advised Ms. Kailian that since he had already issued the Notice of Infraction, he could not interfere with its processing. Ms. Kailian subsequently telephoned Tom Day, a supervisor in the D.C. Department of Public Works, who advised her that, in her words, she should “not worry” about the Notice of Infraction, and that he would “take care of it.” Respondents did not respond to the first Notice of Infraction until receiving the second Notice of Infraction sometime in early December, 2001.

III. Conclusions of Law

1. Respondents have been charged with violating 22 DCMR 107.1 on September 7, 2001 for failing to comply with a Notice to Abate. In this case, Respondents have presented uncontroverted evidence that they never received the Notice, and, in light of the apparent confusion regarding Respondents’ proper address as reflected in the various governmental sources, such evidence is credible. *See* PX 100-101; RX 202-204.

2. Even had Respondents actually received the Notice to Abate, however, the Notice itself provided a 14-day grace period in which Respondents could comply in order to avoid criminal or civil sanctions, including those civil sanctions under the Civil Infractions Act authorized for a violation of 22 DCMR 107.1. PX 100; D.C. Official Code §§ 2-1801.01 *et seq.* Having determined a violation of § 107.1 on the same day the Notice to Abate was issued, *i.e.*, September 7, 2001, the Government did not afford Respondents that grace period. *See DOH v.*

Therman Evans, OAH No. I-02-20246 at 5 (Final Order, November 27, 2002) (noting that a Notice to Abate must be enforced according to its terms).

3. Finally, even if Respondents had actually received the Notice to Abate and been afforded the specified opportunity to cure, the evidence in the record establishes that Respondents neither owned nor otherwise controlled the area on the Property to which the Notice was directed. *See* RX 202-204; *see also* PX 100 (Notice to Abate directed to “Manager/Property Owner”). Accordingly, the Government has not meet its burden of proof as to the charged violation of 22 DCMR 107.1, and that charge shall be dismissed.

4. As to the statutory penalty, the Civil Infractions Act, D.C. Official Code §§ 2-1802.02(f) and 2-1802.05, requires the recipient of a Notice of Infraction to demonstrate “good cause” for failing to answer it within 20 days of the date of service by mail. If a party cannot make such a showing, the statute requires that a penalty equal to the amount of the proposed fine be imposed. D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f).

5. Respondents have not established good cause in this case. Respondents actually received the first Notice of Infraction well within the period that a timely response could have been filed with this administrative court. Respondents intentionally did not answer that Notice, however, choosing instead to rely on an apparent *nudum pactum* of a D.C. government employee that the matter would be “taken care of.”² Respondents’ reliance in this regard was patently unreasonable given the clear instructions on the face of the Notice of Infraction form as to how

² As there is no evidence in this record that there was any consideration for Mr. Day’s offer to assist Ms. Kailian in this case, this administrative court will pretermitt a discussion of the potentially serious criminal and/or ethical violations stemming from such an arrangement. *See, e.g.*, 18 U.S.C. 201 *et seq.* (federal bribery, graft and conflicts of interest provisions); D.C. Official Code § 1-1106.01 (D.C. conflict of interest provisions); 6 DCMR Chapter 18 (D.C. employee conduct provisions).

to respond, as well as the clear warning of monetary sanctions for failing to respond timely. *DOH v. Service Cleaners*, OAH No. I-00-20128 at 6-7 (Final Order, March 8, 2001). Moreover, this case is clearly distinguishable from those in which this administrative court has found good cause where a respondent has relied in good faith upon a Government's inspector's erroneous advice as to how to respond to a Notice of Infraction, e.g., merely appear for the pre-scheduled hearing, and, upon learning of the error, promptly responds to this administrative court. *See, e.g., DOH v. Texaco Service Station*, OAH No. I-00-20126 at 2-3 (Final Order, October 26, 2000); *DOH v. Rolyn Companies*, OAH No. I-00-10325 at 5-6 (Final Order, October 18, 2000). Here, the advice solicited by Respondents did not encompass *how* they should respond to the Notice of Infraction, but whether, in light of Mr. Day's offer, they should bother to respond at all. Accordingly, I must impose a statutory penalty of \$1,000 pursuant to D.C. Official Code §§ 2-1801.02(a)(2)(A) and 2-1802.02(f).³

³ The imposition of the statutory penalty under the Civil Infractions Act does not turn on whether the Government has proven a charge, but on whether a respondent, without good cause, has failed to timely answer the charge. D.C. Official Code §§ 2-1802.02(f). *Accord DOH v. Williams Pest Control Co.*, OAH No. I-00-20085 at 5 (Final Order, June 7, 2001). As this administrative court has previously observed:

In prescribing the penalty, the statute does not distinguish between charges that the Government has proved and those for which there has been a failure of proof. The statutory penalty for failure to file does not depend upon whether the Government has established the underlying violations. Indeed, a contrary rule would subvert the purpose of the penalty provisions of the Civil Infractions Act, which is to promote an efficient adjudication system by encouraging prompt filing of responses to Notices of Infraction. Respondents who believe that they have a valid defense to a charge would have no incentive to file a prompt response if their ultimate vindication would eliminate the late filing penalty.

DOH v. Washington General Contractors, OAH No. I-00-10387 at 11 (Final Order, July 11, 2001).

IV. Order

Based upon the foregoing findings of fact and conclusions of law, and the entire record of this case, it is, hereby, this _____ day of _____, 2003:

ORDERED, that Respondents are **NOT LIABLE** for violating 22 DCMR 107.1 as charged in Notices of Infraction; and it is further

ORDERED, that Respondents, who are jointly and severally liable, shall pay a statutory penalty in the amount of **ONE THOUSAND DOLLARS (\$1,000)** in accordance with the attached instructions within 20 calendar days of the date of mailing of this Order (15 calendar days plus 5 days for service by mail pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that, if Respondents fail to pay the above amount in full within 20 calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1½% per month or portion thereof, beginning with the date of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real or personal property owned by Respondents pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondents' business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

/f/ 01/08/03

Mark D. Poindexter
Administrative Judge